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In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN,
Petitioner,
v.
SPENCER FOUNTAIN,
Respondent;

EVA L. JACKSON,
Petitioner,
v.
JUNIUS I. JACKSON,
Respondent.

ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Motion for Leave to File Brief and Brief of Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr.
in Support of the Petition for Rehearing

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ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Motion for Leave to File Briefs as Amici Curiae

Pursuant to Rule 42 of the United States Supreme Court, Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr., infants, respectfully move this Court for leave to file the brief *amicus curiae* which is submitted herewith. The consent of the attorney for the petitioner herein has been

given by letter, the orginial of which was sent to the Court, but the attorneys for the respondents herein have refused to consent to the filing of a brief by the Conway and Lyles children, and it is assumed that consent would likewise be refused to Weaver and the Evans children. (See letter from counsel for respondent Fountain, Appendix B.)

All of the applicants herein are infants who have made claims against parents for injuries sustained in automobile accidents occurring before September 1, 1971 when the Supreme Court of Virginia rendered a decision overruling prior Virginia decisions holding that a minor child could not sue a parent, *Smith* v. *Kauffman*, 212 Va. 181, 183 S.E. 2d 190 (1971), and after August 18, 1968, the date that the accident in *Smith* v. *Kauffman* occurred. There are others in Virginia similarly situated, as indicated in the letter from counsel for respondent Spencer Fountain to counsel for some *amici* (Appendix B) stating that "there are probably at least a hundred other attorneys with cases of a similar nature . . ."

This Court is called upon to decide whether the decision of the Supreme Court of Virginia making an earlier decision abrogating interspousal immunity prospective only from the date of the decision is a denial of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States to parties whose claims against their spouses arose out of an accident occurring before the date of the decision abrogating the immunity but after the accident in that decision occurred. On the same day of the decision abrogating inter-spousal immunity the Supreme Court of Virginia in *Smith* v. *Kauffman* abrogated the intra-family immunity doctrine thereby permitting minor dependent children to sue their parents for injuries received in motor vehicle accidents due

to the parent's negligence. Since the decision in both *Fountain* v. *Fountain* and *Jackson* v. *Jackson* involved the doctrine of inter-spousal immunity and adult litigants, and since the courts have traditionally accorded special treatment to minors in some situations, applicants feel that the facts in their respective cases should be before the Court in deciding this case.

Wherefore, it is respectfully requested that this application be granted.

Respectfully submitted,

Donald K. Butler,
Counsel for Amici Curiae

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Brief of Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr.

The interest of the *amici curiae* is set forth in the Motion for Leave to File Brief, *supra.*

OPINIONS BELOW

The opinions below are reported at 214 Va. 347, 200 S.E. 2d 513 and 214 Va. 351, 200 S.E. 2d 515 and are set forth in Appendix A and B of the Petition of Fountain and Jackson.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

On September 1, 1971 the Supreme Court of Virginia decided in the case of *Surratt* v. *Thompson,* 212 Va. 191, 183 S.E. 2d 200, that the doctrine of inter-spousal immunity in motor vehicle accident cases would be abolished, thereby permitting one spouse in the case to sue the other for injuries sustained in an accident occurring on June 23, 1968. In the case of *Smith* v. *Kauffman,* 212 Va. 181, 183 S.E. 2d 190, decided the same day, that Court abolished the intra-family doctrine in motor vehicle accidents and thereby permitted an infant child to sue her parent for injuries sustained in an accident occurring on August 18, 1968. In the cases of each of these infant *amici curiae,* injuries were sustained in accidents occurring after August 18, 1968, the date of the accident in the *Smith* case, and before September 1, 1971, the date of the decision in that case.

Cheryl Y. Conway, age 3 on May 18, 1971 when she was involved in an accident in an automobile being operated by her mother, Shirley Conway, filed suit against her mother in the Law and Equity Court of the City of Richmond, Virginia (now the Circuit Court of the City of Richmond, Division I) seeking $50,000.00 damages for personal injuries arising out of the accident. Among the injuries sustained by the Conway child is the permanent loss of use of one arm. This suit ended in a voluntary nonsuit on May 9, 1972 when it was learned that the judges of the Law and Equity Court had held that the petitioner herein, Eunice S. Fountain, and others could not sue a parent or spouse on

the ground that the decisions in *Smith* v. *Kauffman* and *Surratt* v. *Thompson*, were not retrospective and hence not applicable to cases involving accidents occurring prior to the date of the decisions. Counsel for Conway intends to reinstitute suit for her serious injuries if petitioners are successful in reversing the decisions below.

The four Lyles children filed suits against their stepfather for damages totaling $85,000.00 for injuries received in an accident when the vehicle they were occupying, being driven by their mother, collided with another car being driven by their stepfather on August 9, 1970. Pleas of parental immunity have been filed in behalf of the defendant, arguing that the decision in *Smith* v. *Kauffman* is not retroactive so as to be applicable to this case. Decisions on that question as well as on the motion to join the mother as an additional defendant are pending in the Circuit Court of Lunenburg County, Virginia.

Calvin Evans, Patricia Evans, Rodney Evans and Veronica Evans filed suits against their mother, Mary A. Evans, in the Circuit Court of Chesterfield County, Virginia in the amounts of $50, 000.00, $35,000.00, $25,000.00 and $10,000.00 respectively as damages for injuries sustained in an automobile accident occurring on August 14, 1971. The defendants' pleas of intrafamily immunity were kept under advisement pending the decisions below, after which the defendants' motions for summary judgment were granted on January 5, 1974. On February 4, 1974 both plaintiffs filed a notice of appeal to the Supreme Court of Virginia assigning as error a denial of equal protection and due process of law in not applying the decisions of *Smith* and *Surratt* retroactively.

Robert Lee Weaver, Jr. was injured in an accident on December 20, 1970 while an occupant of a car being driven by his father, Robert Lee Weaver, Sr. At the time of the accident the defendant was separated from the plaintiff's mother who had custody of him, and defendant had picked up the plaintiff in an automobile without the mother's consent. Accident investigation reveals that the defendant's car left the highway traveling at 80 m.p.h. in a 55 m.p.h. zone striking a tree, and that the defendant was intoxicated at the time. Among the injuries sustained by the plaintiff were lacerations of the face causing scars requiring extensive plastic surgery, facial nerve impairment causing some facial immobility, permanent impairment to hearing in both ears, and psychological damage. The Weaver child filed suit against his father in the Circuit Court of Lunenburg County, Virginia seeking $250,000.00 compensatory damages and an equal amount in punitive damages. Initially a defense motion to dismiss upon the ground of parental immunity was overruled based on the retroactive application of the *Smith* case, and the case was set for an October, 1973 trial date but had to be continued due to the unavailibility of a witness. Subsequent to that the decision below was rendered and the defendant has moved for a rehearing on its motion to dismiss.

QUESTION PRESENTED FOR REVIEW

The Question Presented for Review is well stated in the Petition for Writ of Certiorari at page 2.

ARGUMENT

Counsel for *amici* have read and for brevity adopt by reference the argument found at pages 5 through 15 of the Petition for Writ of Certiorari. In addition it is pointed

out that while the Fountain and Jackson cases involve suits by wife against husband, and not by child against parent as in the cases of the applicants, it is obvious from reading the decisions below that children injured before the date of the decisions in *Surratt* v. *Thompson* and *Smith* v. *Kauffman, supra,* as well as spouses, are precluded by the decisions below from maintaining suits against their parents. The considerations enunciated in *Fountain* relative to the reliance of insureds and insurers on existing law (see Appendix A of Petition at page 20), are perhaps more applicable to children's claims against parents than to spouses against spouses since Section 8-30 of the 1950 *Code of Virginia,* as amended, permits the tolling of statutes of limitations during infancy. Obviously unless *certiorari* is granted herein, many infants will be denied trial precisely as spouses were denied the right to recover in the two cases below.

The Court below placed much emphasis on the reliance of insureds and insurers in Virginia on the existing law, and herein lies the invidiousness and lack of a rational basis for distinguishing between the injured in *Smith* and *Surratt,* and these petitioners and *amici.* As pointed out in the Petition at page 7, the Supreme Court of Virginia seemed to ignore the uncontradicted evidence before it that a retroactive application of the principles in *Smith* and *Surratt* would not prejudice insurers or insureds. Further, indications of the judicial erosion of immunities because of the advent of liability insurance appeared as early as 1939 when the Supreme Court of Virginia said:

> "In later years, economic, social and legislative changes have caused a judicial reaction to the earlier views. Modern methods of business, new or enlarged occupational capacities and the advent of the automobile and liability indemnity insurance have placed

> the parties in a different position. Therefore, the effect of the earlier decisions must be considered in relation to the occasion, facts and laws upon which they were based. A correct determination of each case must necessarily depend upon its facts and circumstances and the law applicable thereto. Rules of thumb must give way to rules of reason."

Worrell v. *Worrell,* 174 Va. 11, 4 S.E. 2d 343 (1939) at p. 20, pp. 346, 347.

When in 1958 the enactment of the Virginia uninsured motorist laws "effected a further and major change of circumstances" in Virginia's insurance laws (*Smith* v. *Kauffman* at 184), insurance companies in Virginia should have certainly by that time heeded the statement in the *Worrell* opinion at page 28, 4 S.E. 2d at 350, where the Court said:

> "[W]e think that the statutes of this State providing for compulsory insurance indemnity to passengers of a common carrier for damages resulting from the negligent operation of its vehicles, evidence a purpose and policy to afford protection to all such persons from damages arising in tort from the relationship of passenger and carrier."

Thus reliance on existing law by insurers and insureds provide no rational basis for the distinctions made below in *Fountain* and *Jackson.*

The facts set out above are sufficient to show that the cases of petitioners Fountain and Jackson or of these *amici* are not "legal sports" presenting a "unique set of circumstances" which is not "likely to recur." *United States* v. *Shannon,* 342 U.S. 288, 294-5 (1952). The denial of compensation to petitioners, to those who now seek leave to appear as *amici,* and to many others similarly situated in

Virginia and elsewhere, both as a matter of substantive rights and as a denial of a procedural right which Virginia earlier granted others similarly situated in the *Smith* and *Surratt* cases is a matter more worthy of review than the appeal granted in *Dillard* v. *Industrial Commission of Virginia*, 347 F.Supp. 71 (1972), cert. granted, ... U.S. ....., Case No. 73-5412 (October Term, 1973). That case involved a relatively minor procedural deficiency in the Virginia Workmen's Compensation Act which did not, like the decisions below, completely deprive a claimant of a right to compensation for personal injuries.

CONCLUSION

The motion for leave to file this brief should be granted, and *certiorari* should be granted and the judgments below reversed.

Respectfully submitted,

Donald K. Butler
201 North Boulevard
Richmond, Virginia 23220.

Counsel for Amici Curiae

APPENDIX A

ALLEN, ALLEN, ALLEN & ALLEN
Professional Association
1809 Staples Mill Road
Post Office Box 6855
Richmond, Virginia 23230

[LETTERHEAD OMITTED]

March 4, 1974

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Washington, D.C. 20541

Re: Fountain v. Fountain;
Jackson v. Jackson
No. 73-1282

Dear Mr. Rodak:

As counsel for the petitioners in these cases, in which a petition for certiorari was filed February 20, 1974, I give consent to filing of a brief amicus curiae by Donald K. Butler, Esquire, of Richmond, on behalf of Cheryl Conway and others similarly situated.

Respectfully,

James A. Eichner

JAE/rw
cc: Donald K. Butler, Esq.
201 North Boulevard
Richmond, VA 23220

APPENDIX B

BROWDER, RUSSELL, LITTLE AND MORRIS
1510 Ross Building
Richmond, Virginia 23219

[LETTERHEAD OMITTED]

January 25, 1974

Reginald H. Pettus, Esq.
Keysville, Virginia 23947

RE: Fountain v. Fountain
Jackson v. Jackson

Dear Reg:

I have my copy of your letter to Segar Gravatt and me containing a request similar to one made by Donald K. Butler, to whom you will note I am sending a copy of this letter, in view of a case he has involving an infant who would like to sue his mother.

I told Don in a letter, dated January 8, 1974, that I could then see no benefit to my client in complicating Jim Eichner's apparent intention to apply for a writ of *certiorari* by consenting to a brief by him *amicus curiae* but that I would think the matter over and let him hear from me again in due course.

Having so thought it over, I still am of the opinion that there is no reason to complicate anything Jim Eichner proposes to do in the *Fountain* case by bringing in a lot of other people (and I might say that if you and Don come in there are probably at least a hundred other attorneys with cases of a similar nature that should be allowed to come in, and there are at least a hundred insurance companies in Virginia that are also interested in the point who would have a right to come in). All of this seems to me to be to the benefit of no one, including the Court, since as I told Don,

I am sure Jim Eichner will be delighted to have your assistance as well as Don's in preparing whatever brief he proposes to prepare.

I, frankly, don't know what has transpired in Jim's mind since he wrote the article appearing in Vol. 4 of the "University of Virginia Law Review" in 1970 wherein, in speaking of judicial as well as legislative changes in the immunity doctrine, he said at page 279 that:

> "The fear of retroactivity is a groundless one, for a decision to abrogate immunity may be made to take effect prospectively. Other states' solutions have been to make the decision apply only to the case at bar and to causes of action arising after the filing date of the decision, . . ." (citing cases)

I certainly was not impressed with what he had to say about the federal constitutional issue in his briefs in the *Fountain* and *Jackson* cases, which consisted of one sentence in the *Fountain* case and the citation to an *A.L.R.* annotation, which he stated was authority against him except that the cases did not "involve facts like those in this case." He cited no case that did, either in that brief or in the *Jackson* brief, where he did undertake to develop the point to the extent of about one page. I don't recall that he even mentioned the point in oral argument and I don't think the court mentioned it in either opinion. Jim is a smart boy, however, and

Segar and I will of course look forward with a great deal of interest to what he has to say, including such suggestions as you, Don and others may have for him.

With kind regards, I am,

Sincerely,

/s/ Jim
J. B. Browder

JBB/alli

cc: J. Segar Gravatt, Esq.
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